No. 678

IN THE

Supreme Court of the United States.

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OCTOBER TERM, 1912.

National Home for Disabled Volunteer Soldiers and Major Moses Harris, General Treasurer thereof,
APPELLANTS,

vs.

J. E. Parrish,
APPELLEE.

Appealed from the U. S. Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF OF APPELLEE, J. E. PARRISH.

R. E. L. MOUNTCASTLE,
Attorney for Appellee.

SHIELDS & CATES,
Of Counsel.

MC CONAT MERCER JACKSON, TENN.

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Appellants,

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REPLY BRIEF OF APPELLEE, J. E. PARRISH.

The assignment of error from the decree of the Court of Appeals raises the single question as to whether or not the Circuit Court of Appeals and the Court below were in error in allowing interest to appellee on the admittedly just decree granted appellee in the Court of first instance from the date of the completion of the buildings, to-wit, February 15th, 1904.

A significant statement of the argument and of the reasons for the allowance of interest is shown

in the record from the opinion of Judge Sanford, District Judge, as follows:

> "As to the question of interest, I have had great doubt. Interest is not to be awarded on a claim against a sovereign government, unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers. *Angarica vs. Bayard*, 127 U. S., 251, 260; *United States vs. N. C.*, 136 U. S., 211, 216. And it is expressly provided that the Court of Claims shall not allow interest upon any claim against the government unless upon a contract expressly stipulating therefor. R. S., 1091. *Tillman vs. United States*, 100 U. S., 43; *Harvey vs. United States*, 113 U. S., 243. And this inhibition, it has been held, likewise applies in suits to enforce claims against the Government brought in other Federal Courts under the Act of March 3, 1887, or other special Acts not authorizing a recovery of interest. *Baxter vs. United States* (C. C. A. 8 C.), 51 Fed., 671; *United States vs. Barker* (C. C. A. 5 C.), 74 Fed., 483; *Watts vs. United States* (D. C.), 129 Fed., 222.
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> "It has, however, on the other hand, been repeatedly held by the Supreme Court that in a suit brought against a collector of customs to recover taxes illegally collected, interest, in a proper case, may be allowed in the discretion of the Court. *Urskine vs. Van Arsdale*, 15 Wall., 75; *Redfield vs. Iron Co.*, 110 U. S., 174; *Redfield vs. Bartels*, 139 U. S., 694.
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> "Without determining to what extent, if

any, the opinion in *Redfield vs. Bartels* overrules or modifies the general principle stated in *United States vs. North Carolina, supra,* as applied to a direct claim against the Government, I am of the opinion that, in any event, the general doctrine stated in the North Carolina case does not apply so as to prevent the allowance of interest on a claim which is not directly against the Government, but against a corporation, such as the National Home, which, although a Governmental Agency, is sued on a claim growing out of matters directly within the scope of its corporate authority.

"After careful consideration, I held in *Lyle vs. National Home* (C. C.), 170 Fed., 842, that a National Home, being a charitable institution engaged as an agency of the Federal Government in the discharge of a Governmental function, is not subject to suit in an action sounding, in tort, the power to 'sue and be sued in courts of law and equity' conferred on the corporation by Rev. St. 4825, being limited to matters within the scope of the other corporate powers with which it is vested. One of these specific powers is, however, that of procuring sites and having necessary buildings erected. Rev. St. 4830. However, as this necessarily implies the power to contract for the erection of buildings, a suit against a National Home arising out of a contract for the erection of its buildings is clearly not within the rule laid down in the Lyle case. And the National Home being, in my opinion, subject to suit, although a Government agency, in reference to its contract for the erection of buildings,

I see no reason why such suit should not be conducted upon general principles of law, and interest allowed against it in matters growing out of such contract, where interest would be equitably allowed against a private individual. In the present case, the Home contracted for the buildings, and agreed to pay Parrish the amounts due in monthly installments, reserving 10 per cent. until delivery and acceptance, and had in its hands at the time of annulment reserved percentages, on its own estimate of work previously done, aggregating $23,353.00, or more than the principal sum now found to be due Parrish on the basis of the accounting. It obtained possession of the buildings shortly after annulment and the buildings were completed, as reported by the Master, and agreed by counsel at bar, on or before February 15, 1904, since which time it has been in complete possession of the property, using and enjoying the same for its charitable purposes.

"On the whole, I conclude that as this suit is not against the Government directly, the strict rule of law forbidding the allowance of interest is not applicable, but that as it is a suit against a National Home as a Governmental agency, in reference to a matter as to which it is specifically authorized to contract, interest may be allowed against it as against any other litigant upon equitable terms. I accordingly find that the decree in favor of the cross-complainant should bear interest from February 15, 1904, the date of completion of the buildings. In reaching this conclusion, I have resolved the doubt as

to the legal question involved in favor of what appears to me to be clearly the equities of the case, it being, in my judgment, manifestly inequitable that the Home should have had the use and possession of the property during all these years, retaining in its hands the balance due to the cross-complainant,and should not be chargeable with interest thereon. And even this result, it will be seen, will result in an aggregate decree for less than the reasonable value of the property which it obtained at the annulment, as otherwise fixed on a *quantum meruit* basis.

SANFORD, *Judge.*"

The same subject is thoroughly reviewed in the opinion of the Court of Civil Appeals in this language:

"While the question is not free from difficulty, nor its solution entirely clear, we think the liability imposed by these statutory provisions, included by natural implication the usual elements of applicable damage, including interest, in a proper case and in the exercise of a proper discretion, for delay and default in performance. The fact of the omission from the statutes referred to of any provision for exemption from interest, as is expressly contained in the Tucker Act relating to suits directly against the United States, is, we think, significant. Had Congress intended the claimed immunity, it would have seemed natural to have so declared. That the case presented is a proper one for the allowance of interest (if allowable under any

circumstances against a governmental agency) is clear."

(Tr., pp. 89, 90).

A stronger case for the exercise of the discretion of the Court in the allowance of interest, if the power rests in the Court, could not be presented than in the case at bar. It appears from the findings of the District Judge that at the time the authorities completed the Home and took complete possession thereof, said Home had at the time, belonging to Parrish, the sum of $23,353.00, as retained and reserved percentages on its own estimate of the work, or, as stated by the District Judge, " more than the principal sum now found to be due Parrish on the basis of the accounting." It likewise appears that not only did the Home retain possession of the completed structure and the retained percentages due Parrish on the completion of the work and which became accelerated by the annulment of the contract in Parrish's hands, but Parrish had in fact, according to the amount of *quantum meruit* found by the District Judge, put nearly $60,000.00 of his own money into said Home, which he never recovered and of which the Home had the full use, benefit and value, all of which money so paid out by Parrish under said contract he has lost except the $21,000.00, which is the amount of the decree herein, unappealed from as to the principal, and which is $2,000.00 less than his

own money retained in the hands of the Home, unless the interest is here allowed by the Court.

It is manifest, therefore, if the power is in the Court to grant the interest at all, the discretion is one which the Court should exercise, and the lower Courts having so exercised it with ample grounds, such exercise will not be disturbed by this Court.

This power to grant interest is denied by appellant upon the ground that the Home is the agency of the Government and therefore, without the Government's consent, interest could not be charged. Now there is no express authority granted in the Act creating the Home for the Government to be sued at all, and if this be treated as a suit against the Government, and the rights of appellee determinable only on that consideration, the appellee would have no right of action against the Home, even in the principal sum due, much less the interest; but the fact that the Home authorities are permitted to sue and be sued carries with it necessarily the right to sue and be sued with respect to those things committed by the Government to the action of said Home authorities, and in such case, when so committed to said Home authorities, the rights of action granted thereunder by implication carry such rights and remedies as are incident to other persons.

It is admitted by the appellant that no case exactly in point may be found and reliance is had upon the case of *United States vs. North Carolina,* 136 U. S., 216, and cases cited thereunder. Said suit was against North Carolina itself on bonds which the State had issued and which bonds only, together with the coupons, were to be paid at a certain date. The Supreme Court held that, while there was authority given by the State as a sovereign for the principal to be paid, yet in the absence of authority for the payment of interest, no judgment for interest could be granted. It was not contended that North Carolina would be liable to suit at all for the principal, except for the reason that it had agreed to be so liable.

The same is true as to the case of *United States vs. Sherman,* 98 U. S., 567, wherein the United States had received certain moneys through its officers and had agreed by Act of Congress to be liable for that amount and no more.

The principle of these cases is that the Government cannot be liable in a suit against it for anything more than it has contracted to be liable for, and the same was a suit directly against a sovereign on specific statutes defining the limit of recovery therein, and since the sovereign was liable only by virtue of the permission granted, the permission could not be extended, and said cases rest upon entirely different grounds from the principles controlling the case at bar, and it is clear that

if, in the cases referred to, there had not been the express consent of the sovereign to suit and recovery of the principal, not even the suit for the principal would have been successfully maintained.

If this were a suit against the United States in the sense in which the expression, "United States," is used in the cases referred to, the suit would not be maintainable in the first instance, it having been repeatedly held that a moneyed judgment cannot be maintained against the United States in any Federal Court except the Court of Claims. *Case vs. Terrell,* 11 Wall., 201. So it is manifest that the case at bar must be differentiated from an ordinary case against the United States. It is also to be admitted that there is no Federal Statute bearing upon the allowance of interest in a case of this sort. It is true there is a statutory bearing upon the question of interest upon claims triable and which pass through the Court of Claims, created by Congress, Section 1091 Revised Statutes, which is as follows:

> "No interest shall be allowed upon any claim up to the time of rendition of judgment thereon unless upon a contract expressly stipulating for the payment of interest."

The present case, however, is one which could not be set up in any Court of Claims. (Sec. 105-G et seq. of the Revised Statutes), and it is not in

fact set up in said Court. The National Home for Disabled Volunteer Soldiers is a corporate body, expressly vested by the Congress of the United States with the power to sue and be sued with respect to its contracts, which excludes it from the jurisdiction of the Court of Claims. It might well be said that a suit against a customs officer to collect excess duty paid under protest might be a claim referrable to the Court of Claims, or might be a claim founded upon a law of Congress, regulation of the Executive Department, or a contract expressed or implied with the Government of the United States, yet this Court in such a case, affecting the taxing power of the Government and seeking to reach its funds, has held that such demand against the customs officer where such excess duties have been collected, is entitled to bear interest from the date of the demand by suit, and discusses the question of interest in cases of this kind at length. *Redfield vs. Bartels,* 139 U. S., 695. See also *Redfield vs. Ysalyfera Iron Co.,* 110 U. S., 174-176. The Court in the Bartels case quotes approvingly from the decision in the 110 U. S. case, as follows:

> "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for the default on the part of his debtor. Where it is reserved expressly in the contract or is implied by the nature of the premises, it becomes a part of the debt and is recoverable as of right; but when it is given as damages it is often a matter of discretion. In cases like

> the present, of recoveries for excessive duties paid under protest, it was held in *Erskine vs. Van Arsdale,* 15 Wall., 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal transaction."

The Court in the Redfield case allowed interest on the amount of money paid under protest and in a suit directly against the collector of the port as the agency of the Government, the said interest being allowable from the date process was served to recover the two several amounts, and without in fact any contract for interest, but based on the rights of the parties at law and so determined expressly by the Court.

Appellant has insisted that the above was a suit simply against the defendant individually, which of course is not true, as the suit is against him officially as the collector of a port and an officer and agent of the Government, and said suit was defended in this Court by the Assistant Attorney-General of the United States.

So also in the case of *Shanley vs. Herold,* 141 Fed., 423, the controversy was there on the inheritance tax, the same having been paid under protest, the defendant being a Revenue Collector, and he was held liable as an agency of the Government for the amount of money wrongfully collected as such agent and officer, and interest

was allowed upon the amount of the judgment payable out of the Treasury of the United States.

It is insisted by the appellants that certain decisions of various courts affirm the principle to the effect that a charitable corporation created as an entity in law by the State itself for Governmental purposes, and maintained by the State, should have applied to it the rules of law applied to the State of which it is a part, and that the cases cited are analogous to the case here presented. It is sufficient to say that said cases only show the application of the familiar rule of law that a public corporate body, whether created as an industrial school of reform or other charitable enterprise, cannot be held liable for assaults and batteries or other torts, or even negligence of said officers. And this is upon the ground of public policy. The functions of a State institution are governmental and their funds cannot be diverted from their intended beneficent purpose by damages caused by negligence of malicious servants. *Williamson vs. Industrial School,* 95 Ky., 25 (44 Amer. State Rep., 244). To the same effect is *Moody vs. State Prison of N. C.,* 53 L. R. A., 855, the latter Court saying:

> "Being an agency of the State, the State's Prison could only be sued when expressly authorized to be sued. The Statute incorporating the defendant does not contain the authority to sue and be sued. But even if such authority was given, it would cover only

> actions ordinarily incidental to its operations and would not extend to causes of action like the present. There is a distinct difference between conferring suability as to debts and other liabilities for which the State's Prison is now liable, and to extending liability for causes not heretofore recognized. The exemption of the State from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon the ground of public policy, which denied its liability for such damages.
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> "As to the cities and towns, though by their charters they are broadly authorized 'to sue and be sued,' it is equally well settled that suability does not create any liability for damages caused by torts of their officers and agents when acting in governmental capacity."

See also the case of *Maia vs. Eastern State Hospital,* 97 Va., 47 L. R. A., 577. In this case, although the corporation was authorized to sue and be sued, yet the same was held not liable for injury to an inmate caused by the negligence or misconduct of persons in charge of the hospital, it being said in said case:

> "A distinction was drawn between powers and duties which were granted to or imposed upon a public body as an agency of the Government to be exercised and performed exclusively for public, governmental purposes, and those powers and privileges which are exercised by a corporation or body for its

> own private advantage, and are for public purposes in no other sense than that the public derived a common benefit from a proper discharge of the duties arising from the grant. For the negligent exercise of performance of the former class of powers and duties, it was held that the city was not liable, and as the injury complained of belonged to that class, it was held that the action would not lie, while it was admitted that, if the injury had resulted from negligence in the exercise of performance of the latter class of powers or duties, the city would have been liable in the same manner as an individual or private corporation."
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> "It was to recover the value of property which the defendant had the right to purchase for the maintenance of those intrusted to its care, and pay for out of the appropriation made for that purpose by the State; and the plaintiff's property having been converted to the use of the corporation for the same purposes for which it had authority to purchase it, it ought to have paid for it, and the Court very properly held that an action would lie to compel it to do so."

These cases really support the contention of appellee herein. If this had been an action against a charitable institution supported by the Government, for a tort or negligence of its officers, the cases cited in analogy would apply in defeat thereof. But in this case the same authorities support the proposition in our favor that, where the corporation is intrusted with certain

duties and powers, and acts under them, and incurs certain obligations thereby to others, these obligations may be enforced, with the same duties and incidents and remedies as allowed to other persons and governed by the same rules. When understood, with reference to the different classes of cases and the reasons underlying the same, there disappears any apparent inconsistency between the cases of *Redfield vs. Bartels* and *United States vs. North Carolina,* as adverted to in the opinion of the District Judge below. The distinction, we insist, is that in the case of *United States vs. North Carolina,* this was a suit brought in pursuance to a certain statute which had been passed by the State, limiting its own liability to suit for bonds. In such suit against a sovereignty, the litigant was limited to the express right granted. However, in *Redfield vs. Bartels,* against an agency of the Government, which had acted in the collection of certain revenues, the agency of the Government was held liable for the wrongful collection, and there being no statute contrary to the allowance of interest, and it being apparent that in the discretion of the Court interest should be allowable in such case, interest was allowed in the discretion of the Court. So that, if, in the case at bar, the United States, by charter to the National Home for Disabled Volunteer Soldiers, had provided that, while the corporation could be sued, it could be sued only for the principal and not for interest arising from any obligation created by the management of the

Soldiers Home, under said statute this restriction would have controlled, as in the North Carolina case, but giving the broad powers to sue and be sued, without discrimination as to the subject matter of suit, and allowing the Board of Managers of the Soldiers Home to contract, as they are especially authorized to contract, and this contract in the case at bar arising out of granted powers to the Soldiers Home, it becomes evident that the reasoning of the Court in the Redfield case, upon general principles of law and equity, controls the case at bar.

So that the case is reduced to this: if the National Home for Disabled Volunteer Soldiers, under this contract, is liable for the principal sum of $21,000.00, which is admitted, then that liability brings this case within the rule as to the liability of any other person or corporation, and allows interest to be taxed in the discretion of the Court, as was the case in *Redfield vs. Bartels,* and we therefore respectfully insist that the decree of the Court of Appeals should be affirmed.

Respectfully submitted,

R. E. L. MOUNTCASTLE,
Atty. for Appellee.

SHIELDS & CATES,
Of Counsel.